**U.S. Department of Labor**

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: April 19, 1989
CASE NO. 88-INA-280

IN THE MATTER OF

DUVAL-BIBB COMPANY,
Employer

on behalf of

KENNETH OWEN SPITTLE,
Alien

Donna M. Previti, Esq.
Miami, FL.
For the Employer

BEFORE: Litt, Chief Judge; and Brenner, Tureck, Guill and Williams,
Administrative Law Judges

JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) (hereinafter "the Act"). The Employer requested review from U.S. Department of Labor Certifying Officer Austin L. Miller's denial of a labor certification application pursuant to 20 C.F.R. §656.26.[1]

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and (2) the employment of the alien will

[1] All of the regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of Part 656 of the regulations have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means, in order to make a good faith test of U.S. worker availability.

This review of the denial of a labor certification is based on the record upon which the denial was made, together with the request for administrative - judicial review, as contained in an Appeal File ("AF"), and any written arguments of the parties [see §656.27(c)].

Statement of the Case

On September 22, 1986, Employer, a Tampa, Florida company which markets and distributes books and periodicals, applied for labor certification on behalf of the Alien Kenneth Owen Spittle (AF 197). The job offered was that of a Management Analyst. The duties of the position were described by Employer as follows:

> Application of Psychology of Mind, human relations principles to accomplish the following job duties: Work with employees at all levels using good interpersonal skills; advise and guide managers to create positive organizational change; compile data and evaluate specific organizational needs; develop programs to improve interpersonal communications and organizational productivity.

(Id.) Although no specific educational requirements were stated, Employer did require one year of training or experience in "Psychology of Mind human relations principles." (Id.)[2]

In an initial Notice of Findings ("NOF") dated July 23, 1987 (AF 117-24), the Certifying Officer ("CO") noted several deficiencies in Employer's recruitment. Although he found violations under several sections of the regulations, the crux of the NOF was that the requirement of one year of training or experience in "Psychology of Mind" principles was unduly restrictive, and would have to be justified as arising from business necessity in accordance with §656.21(b)(2)(i) of the regulations. Absent this requirement, the CO noted that at least five U.S. workers who applied for the job were qualified to perform it.

In a rebuttal dated August 31, 1987 (AF 45-117), Employer explained that "for a number of years we have had a very active management and supervisor training program." (AF 71).

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[2] It appears from this record that the Alien received the required training -- one year in "Psychology of Mind" principles -- after he was hired by employer. Since Employer was requiring this training of job applicants, it may not have been Employer's actual minimum job requirement, in violation of §656.21(b)(6). However, this issue was not raised by the Certifying Officer, and we decline to raise it sua sponte.

Employer listed several of the courses to which it sent employees for management training and noted that, since 1983, it has employed consultants trained in "Psychology of Mind" principles with great success (AF 71-72). Employer also stated that it has spent over $200,000 in training its employees in "Psychology of Mind" principles in the two years prior to August, 1987 (AF 97-98). Employer contends that its Manangement Analysts must have ""Psychology of Mind" training, to provide consistency and to be able to direct subdivisions of Employer's business to the appropriate training programs (AF 72). Employer also submitted an article entitled "The Application of the Psychology of Mind in Organizational Settings" (AF 75-85) by "the director of the Advanced Human Studies Institute and the primary developer of the Psychology of Mind," Dr. Enrique M. Suarez, (AF 73), as well as other articles and letters by proponents of "Psychology of Mind" principles (AF 86-96).

In response to this rebuttal evidence, the CO issued a second NOF on October 26, 1987 (AF 34-37). In this NOF, the CO raised only one issue -- whether Employer violated §656.21(b)(6). The CO placed a check mark next to a paragraph describing the requirements of that subsection of the regulations, and placed another check mark next to the following statement: "The alien does not have the experience required by the employer. Thus, the employer has not documented the minimum acceptable requirements of the job." (AF 37). The CO stated that Employer "must complete item 11 [Names and Addresses of Schools, Colleges and Universities Attended (Include trade or vocational training facilities)] of the [Form ETA] 750B . . . " (id.), an enigmatic comment since the copy of that form in the file (AF 51) appears to be complete, and "must list the courses required for one year of training for the management analyst's position." (Id.)

In its second rebuttal (undated but received by DOL on December 28 1987) (AF 6-33), the Employer addressed all the points raised by the CO in his second NOF, both in direct correspondence and with additional documentation. Included in this documentation was a "Certificate of Completion" from the Advanced Human Studies Institute signed by, inter alia, Dr. Suarez, stating that the Alien had completed "Fellowship in Organizational and Management Psychology." (AF 15). This certificate is dated August 9, 1986. That this certificate indicates completion of a one-year training course is confirmed in a letter from Dr. Suarez (AF 12).

On February 29, 1988, the CO issued a Final Determination denying certification (AF 4-5). Without citing any sections of the regulations (other than a general reference to Part 656), the CO found that the requirement of ""Psychology of Mind" training was unduly restrictive. In explaining this finding, the CO stated that

> The employer provide[d] no documentation to show that previous management analysts were required to possess this training prior to hiring. . . . The employer's record demonstrates that the training in psychology of mind principles was provided to employees after hiring.

(AF 5). The CO then reiterated that, without this requirement, five applicants met the requirements for the job.

## Discussion

In its request for review dated March 31, 1988, Employer contended, first, that it had established that the requirement of training in "Psychology of Mind" principles arises from business necessity. However, we hold that it was unnecessary for Employer to establish the business necessity for this requirement, since a violation of §656.21(b)(2)(i) has not been alleged by the CO since his first NOF. The second NOF clearly addressed only §656.21(b)(6); and the Final Determination, although using the term "unduly restrictive job requirements", which is found in §656.21(b)(2), clearly is alleging that the requirement of training in"Psychology of Mind" principles does not represent Employer's actual minimum requirements, since it has not previously required management analysts to possess this training and has provided this training to employees after they were hired. Thus the CO was not using the term "unduly restrictive job requirements" as that term appears in §656.21(b)(2); rather, he erroneously applied it to mean that this job requirement had not been required of other workers.

Second, employer contends that

> The Certifying Officer's conclusion that Psychology of Mind is the employer's preference because prior management analysts did not possess this training and that employees were trained in Psychology of Mind after they were hired results from a gross misunderstanding.

(AF 2). Employer is correct in its contention. It is clear from the record that the requirement of pre-hire training in"Psychology of Mind" principles has not been required previously because Employer used to do all this training through consultants. Employer now desires to do this training in-house, due to the enormous expense of contracting it out -- over $200,000 in a recent two-year period. This training will be the responsibility of the employee holding the management analyst position being offered. Accordingly, Employer has established that the requirement of a year's training in "Psychology of Mind" principles is its actual minimum requirement for the position, and does not violate §656.21(b)(6).[3]

According, since the only reason given by the CO for denying certification cannot be upheld, and since there were no qualified U.S. workers who could perform the job, certification should have been granted. Therefore, the CO's determination denying certification is reversed.

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[3] Employer also noted that the CO's reason for denying certification -- that no previous management analysts had been required to have "Psychology of Mind" training -- had not been raised previously by the CO (AF 2). Employer is correct, and therefore it may have been unnecessary for the Board to reach this issue. Nonetheless, since the CO clearly did allege a violation of §656.21(b)(6) in the second NOF, and implicitly found such a violation in the Final Determination, it is prudent to address this issue, which also arises under §656.21(b)(6).

## ORDER

The Final Determination of the Certifying Officer denying certification is reversed, and certification is granted.

JEFFREY TURECK
Administrative Law Judge

JT/jb